

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 22, 2009

ZORAN DJORDJEVIC v. GROZDANA DJORDJEVIC

**Appeal from the Circuit Court for Hamilton County
No. 07D507 L. Marie Williams, Judge**

No. E2008-01793-COA-R3-CV - FILED AUGUST 19, 2009

Zoran Djordjevic (“Husband”) sued Grozdana Djordjevic (“Wife”) for divorce. After a trial, the Trial Court entered a Final Decree of Divorce that, *inter alia*, declared the parties divorced upon stipulated grounds, distributed the marital property, named Wife the primary residential parent of the parties’ minor child with Husband to have visitation, ordered Husband to pay child support, and ordered Husband to pay \$5,000 of Wife’s attorney’s fees. Husband appeals to this Court raising issues regarding parenting time, the calculation of child support, the distribution of marital property, and the award to Wife of attorney’s fees. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed;
Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

Alan R. Beard, Chattanooga, Tennessee for the Appellant, Zoran Djordjevic.

Rachel Brock, Chattanooga, Tennessee for the Appellee, Grozdana Djordjevic.

OPINION

Background

In December of 2006, Wife obtained an Order of Protection that, among other things, restrained Husband from any contact with Wife, awarded Wife exclusive possession of the parties' residence, awarded Wife custody of the parties' minor child, and provided procedures to allow Husband to exercise visitation with their child. The Order of Protection was in effect until December 18, 2007 and allowed Wife the option to request a continuation of the order upon notice to Husband.

Husband filed for divorce in March of 2007. The parties mediated, and the Final Report of Mediator shows that the parties were able to mediate a "Temporary Plan." However, the Final Report of Mediator contained in the record on appeal contains no details regarding the Temporary Plan.

After a trial, the Trial Court entered a Final Decree of Divorce. Wife filed a motion to alter and amend and, after a hearing, the Trial Court granted Wife's motion to alter or amend "so as to permit the court to set attorney's fees." The Trial Court entered an Amended Final Decree of Divorce on June 9, 2008 that, *inter alia*, declared the parties divorced upon stipulated grounds, distributed the marital property, named Wife the primary residential parent of the parties' minor child with Husband to have visitation, and ordered Husband to pay child support and \$5,000 of Wife's attorney's fees. Husband filed a motion for a new trial or to alter or amend. After a hearing on Husband's motion, the Trial Court entered an Amended Order¹ on September 30, 2008 overruling Husband's motion "with one exception." In pertinent detail, the Trial Court's September 30, 2008 order provides:

Upon a review of the testimony in this cause, the exhibits, and all applicable law, it is the finding of the Court the motion for new trial or to alter or amend should be overruled with one exception.

The [Husband] first contends the debt of approximately \$30,000.00 owed to Ms. Pezella should be borne equally by the parties. [Husband] argues the debt should be borne equally by the parties because it was used solely for household purposes. The Court has ordered the debt to be paid from proceeds from the sale of marital property. Therefore, the debt is being paid with marital assets and is an equal division unless there is a deficit. In the eventuality that the debt to Ms. Pezella is not extinguished by the proceeds of the sale, the Court has ORDERED the balance to be paid by the [Husband]. The Court finds this to be an equitable division as [Husband] took the insurance proceeds for damage to one of the rental units in the amount of \$8,000.00 for his personal use. The evidence has established part of this money was used for a four-week trip to Europe by [Husband]. Further, he has been responsible for the dissipation of marital assets other than the insurance money. He has used rent money for purposes other than mortgage payments and the property has gone into

¹The Trial Court's original order on this motion was amended to correct a clerical error.

foreclosure. Accordingly, if there is a balance due on the debts to be borne, it is equitable that he bear it.

[Husband] next objects to the Court imputing income to [Husband]. He relies primarily on Exhibit 1 which is and [sic] April 5, 2007 letter from a New York physician. The exhibit was received without objection despite its hearsay nature. It relates his complaints of ongoing discomfort in the neck, back, right ankle, and both shoulders to a January 7, 2001 work-related accident which this physician contends left him totally disabled. The record establishes that despite the work related injury, [Husband] has earned monies in the maintenance, supervision, and management of rental units. He drives to and from New York periodically for doctor's appointments. He is allowed to make up to \$10,000.00 a year without any impact on his disability related income. In 2006, he was working with Acoustical Ceiling Tiles and earning \$15.00 an hour. By his own testimony, he can work three to four hours a day light duty. He is receiving no medical treatment in this vicinity for his injury. He concedes when the rental units are full, he can experience a positive cash flow. Even though the rental units have been liquidated, or will have been by the conclusion of this litigation, he still holds the skill set necessary to earn income in management of rental units. While working in New York, he was a superintendent in a rental building. The testimony from a relatively recent employer established he had been working eight hours a day, forty hours a week, at \$15.00 an hour in 2006. There is no persuasive testimony in the record that his condition has deteriorated to the point he no longer can make at least \$10,000.00 per year in addition to his disability payments.

[Husband] next asks that the parenting plan be amended so that the father has the minor child while the mother works the graveyard shift at Shaw Industries or, in the alternatively [sic], he be named the primary residential parent because [of] the mother's sporadic and inconsistent third shift schedule. He argues that this schedule mandates the alteration of the permanent parenting plan. Further, he contends the parties had agreed at mediation to a different schedule.

The file is clear, as is the report of the mediator, that the agreement coming out of the mediation was only for a temporary parenting plan. The [Wife] objected to joint custody or to a continuation of the schedule to which the parties adhered while she was working night shift at Shaw. At the time of the trial, she was in the process of changing jobs so that she would no longer be working a night shift. Rather, she would be working a more standardized day job. Therefore, the mother will be available to care for the child. She is concerned that the child does not have enough stability because of the schedule. There is a [sic] significant evidence of the use of profanity towards the son and about the mother in front of the child.

The Court is guided by T.C.A. 36-6-404 in determining the terms of the permanent parenting plan. The Court has found the permanent parenting plan incorporated in the final decree is in the best interest of the child, provides for the

child's changing needs as the child grows and matures, establishes the authority and responsibility of each parent, and attempts to minimize the child's exposure to harmful parental conflict. The Court finds the mother has taken the greater responsibility for performing parenting responsibilities concerning the child and has a greater ability to instruct, inspire, and encourage the child to prepare for a life of service. She is more willing to facilitate and encourage a close and continuing parent-child relationship between the child and father than is the father towards her. The father's derogatory comments about the mother in the presence of the child are evidence of this. The mother has been the primary caretaker despite her erratic work schedule. The father has a history of domestic violence towards a prior spouse, his current spouse, and his children. The mother has adapted her employment schedule in a way that makes the permanent parenting plan realistic. Accordingly, the residential schedule of the permanent parenting plan is not amended.

[Husband] next asks the Court to amend the award of attorney's fees to the wife as it is excessive and the wife earns more than the husband. The Court awarded only a third of the attorney's fee requested. Further, the Court's findings concerning income, assets and dissipation of assets, determination of child support, and fault support the award of the attorney's fee. The Court will amend the final decree to provide that in the event there are monies left over from the sale of real property after the debt to Ms. Pezella [is] satisfied, [Husband's] portion of those monies will be applied to the attorney's fee obligation.

Husband appealed to this Court and, among other things, filed a statement of the evidence in lieu of a transcript. The Trial Court reviewed Husband's proposed statement of the evidence and then entered an Order Regarding Statement of the Evidence, which provides:

This cause is before the Court for approval of the record by the trial court pursuant to Rule 24 of the *Tennessee Rules of Appellate Procedure*. The Court has reviewed the statement of the evidence filed by the [Husband] and amends it in the following respects.

The [Husband] testified he is unable to work due to work-related injuries. The [Husband] offered to the Court one letter concerning his medical condition which was received into evidence, that being Exhibit 1, a letter from New York Orthopaedic Surgery and Rehabilitation dated April 5, 2007.

The [Husband] testified the Buena Vista property included on Exhibit 2, his income and expense statement, had been foreclosed on by the time of trial. The parties still owned two more duplexes on North Terrace and Montview. In April of 2007, he rented a machine to scrub the floor and put on three coats of polyurethane. The [Husband] further testified when he worked for her sister's fiancé, Mike Long, he was making \$15.00 an hour cutting acoustical ceiling tiles. He testified he has done some maintenance on his rental properties. He does the garbage pickup and repairs. He has supplemented his workers' compensation income to make the duplex

payments. The [Husband] testified if he can find a place that will employ him, he can earn legally up to \$10,000.00 a year under New York law in addition to his workers' compensation benefits. If one of the duplexes he owns is fully occupied, it can bring a positive cash flow. [Husband] testified that he had received \$8,000.00 in insurance proceeds as a result of damage to the Montview property. He testified on cross-examination, he did not spend the \$8,000.00 insurance money on the property. Rather, he took a four-week trip to Europe to visit family.

The [Husband] testified in 2006 he did some light work for Mike Long which consisted of cutting acoustical ceiling tiles that did not require heavy lifting. He testified he believed there was an inappropriate relationship between Mr. Long and his wife.

The [Husband] further testified that the parties were adhering to their mediated agreement, and that for the past year and a half, the parties were essentially sharing equally in the parenting time with the minor child, age four. He testified that he was always at home and available, and that the [Wife] worked 12-hour days, on the night shift, from 8:00 p.m. to 8:00 a.m. the next morning, three days one week and four the next. He requested to the Court that he have their son at his home during the times that the [Wife] worked, as well as other reasonable times, including sharing the weekends. He further testified he had been paying child support of \$180.00 per month, as ordered, and had not missed any payments. He testified that there had been no problems with the current parenting schedule. The [Husband] testified he never uses profanity at any time, let alone in front of the child. He testified that the [Wife] spans the child too hard and at times uses a wooden spoon to spank the child. The [Wife] denied these facts and admitted to spanking the child one time. The [Husband] further testified that he never uses corporal punishment on the child and has never at any time spanked the child.

The [Wife] testified that while the [Husband] was receiving workers' compensation and after the permanent partial disability rating, the [Husband] has continued to work. While in New York, they were superintendents in a building so they got the rent free and he and she would do the jobs in the building. While in Tennessee, the [Husband] maintained the properties they had and if there was any major work like plaster or electrical work, she would clean up after the work was done by him. After they moved to Tennessee, the [Husband] started working for the [Wife's] sister's fiancé, Mike Long, and was paid \$15.00 an hour, sometimes making \$600.00 a week or more. Her stepson also worked for Mike Long. The [Wife] testified the [Husband] was putting up ceiling tiles.

The [Wife] testified the [Husband] would drive seven to ten hours to New York to have a few therapies to prove to workers' comp that he was in New York and doing the therapy.

Concerning the duplexes, she testified in a good month they would make \$50.00 to \$100.00 after mortgages and taxes. The profits did not stop until the parties separated. The [Husband] told her he was going to let it all go because he did not want her to get any money out of anything.

The [Wife] denied she had any affair with her sister's boyfriend, Mike Long, for whom the [Husband] was working.

The parties separated November 23, 2006 and [Wife] does not have firsthand knowledge about [Husband's] employment since then.

Mike Long testified he was a mutual friend of the family and dated the [Wife's] sister. The [Husband] worked on a regular basis for him and did not call in sick. In the beginning, he wrote checks in the wife's name but in the end paid the [Husband] cash. The [Husband] worked eight hours a day, forty hours a week, and Mr. Long paid him \$15.00 an hour. After the parties separated, the husband continued to work for Mr. Long. The [Husband] never told Mr. Long he could not or did not want to work.

The [Wife] testified the minor child needed a more stable environment and she did not agree to joint custody. She is making arrangements to change her work schedule to be with the child when he starts Pre-K in 2008. The child has behavioral issues when she picks him up after being with the Father. When the child is with his Father and she is on the phone with the child, she hears the Father using profanity towards the child and "bad-mouthing" her in front of the child. She testified that if her job at Shaw would not accommodate her being with the child when school started, she would get a different job so she could work while he was in school and pick him up from school and be with him at night.

The [Husband] conceded the property he wanted the wife to take was not rentable. He testified that because he had been paying the mortgage out of personal money, he should take the insurance money to pay himself back. He paid the taxes on North Terrace, the property he wanted to retain, but not on Montview.

The [Husband] denied hitting his other son and first denied being charged with domestic assault as to that boy and then said the charges were dropped. Exhibit 3 is a photograph of the older son after the incident. The [Wife] testified the child of the marriage was present when the [Wife] was assaulted by the [Husband] in 2006. The [Wife] testified that the [Husband] picked their child up by his arm, twisted it, and put the child's face in the pillow. The [Wife] testified to domestic violence directed by the Father to his son and daughter of a prior relationship. She testified on September 5, 2006, he beat the other son so badly he ran away. He beat the boy on at least 10 to 15 occasions.

The [Husband] testified in 2006 he was convicted of domestic assault, was sentenced to 11 months and 29 days, and sent to a batterers' intervention program.

The [Husband] testified that he has never used insurance proceeds from a rental for his own use. He testified that he, not the [Wife], was paying the mortgages on the units and he paid for all repairs without the [Wife's] help. He testified that he had paid much more in expenses from his own funds than the insurance amount and, in fact, had borrowed \$1,300.00 from a friend to keep up with all the expenses and much of the insurance funds were used for additional expenses on the unit. The [Husband] testified that the insurance proceeds were paid to him in August, 2007. He testified he remained current on the mortgage payments for the Montview duplex, which was damaged by vandalism, through December of 2007. He did not rent the units and, therefore, they generated no income.

[Husband] testified the duplex [sic] had gone into foreclosure because they did not stay rented. Had they been rented, they would not have gone into foreclosure.

The [Husband] requested to the Court that he be awarded the duplex he resided in (North Terrace), which was current on payments, and that the [Wife] be awarded the second, larger, duplex (Montview) which was empty and on which he had not paid the taxes. The [Husband] testified that at the time of trial neither duplex was in foreclosure.

It was stipulated the [Wife's] income was \$2,119.61 a month and that she paid \$143.00 a month for dental and health insurance for the minor child.

It is ORDERED this Statement of the Evidence is approved and the statement filed by [Husband] specifically not approved.

Discussion

Although not stated exactly as such, Husband raises four issues on appeal: 1) whether the Trial Court erred in reducing Husband's parenting time from that under the mediated temporary plan the parties operated under until the trial, or alternatively in failing to allow Husband to parent the child while Wife worked the night shift; 2) whether the Trial Court erred in imputing income to Husband for purposes of calculating child support; 3) whether the Trial Court erred in ordering that the \$30,000 marital debt owed to Ms. Pezella be assumed solely by Husband; and, 4) whether the Trial Court erred in awarding Wife \$5,000 in attorney's fees. Wife requests attorney's fees on appeal.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We first address whether the Trial Court erred in reducing Husband's parenting time from that under the mediated temporary plan the parties operated under up to trial, or alternatively in failing to allow Husband to parent the child while Wife worked the night shift. In his brief on appeal, Husband argues that "a custody order is *res judicata* unless some new fact has occurred which has altered the circumstances in a material way" and cites to *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999) in support of this proposition.

We note that *Hoalcraft v. Smithson* states:

In child custody cases, the law is well established that when a decree awarding custody of children has been entered, that decree is *res judicata* and is conclusive in a subsequent application to change custody unless some new fact has occurred which has altered the circumstances in a material way so that the welfare of the child requires a change of custody.

Hoalcraft v. Smithson, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). However, in *Hoalcraft* this Court was addressing an issue regarding an application for a change of custody subsequent to the entry of a final order of custody. In the case now before us on appeal, the mediated agreement that the parties operated under before trial was, by its very nature, temporary and not a final order, and therefore, was not *res judicata*.

The record before us on appeal shows that the Trial Court properly considered the evidence before it and carefully considered what would be in the best interest of the child. In its Amended Final Decree of Divorce, the Trial Court found and held with regard to this issue:

The Court specifically finds that evidence codified as T.C.A. § 38-6-404(b)(12) (Evidence of physical or emotional abuse to the child, to the other parent or to any other person), has been a limiting factor in awarding parenting time to the [Husband] when determining a permanent parenting plan. The Court finds that the [Husband] has made admissions with regard to this section that should limit his parenting time with the minor child. Due to this and all other factors in that section, the attached Permanent Parenting Plan provides adequate and sufficient provision for the parenting schedule and support of the child.

In its September 30, 2008 Amended Order, the Trial Court further found and held with regard to this issue, *inter alia*:

The Court has found the permanent parenting plan incorporated in the final decree is in the best interest of the child, provides for the child's changing needs as the child grows and matures, establishes the authority and responsibility of each parent, and attempts to minimize the child's exposure to harmful parental conflict. The Court finds the mother has taken the greater responsibility for performing parenting responsibilities concerning the child and has a greater ability to instruct, inspire, and encourage the child to prepare for a life of service. She is more willing to facilitate and encourage a close and continuing parent-child relationship between the child and father than is the father towards her. The father's derogatory comments about the mother in the presence of the child are evidence of this. The mother has been the primary caretaker despite her erratic work schedule. The father has a history of domestic violence towards a prior spouse, his current spouse, and his children. The mother has adapted her employment schedule in a way that makes the permanent parenting plan realistic.

The Trial Court applied both the correct procedure and analysis in arriving at what was the initial permanent parenting plan. The evidence does not preponderate against the Trial Court's findings relative to this issue, and we find no error in the Trial Court's decision regarding the permanent parenting plan.

We next consider whether the Trial Court erred in imputing income to Husband for purposes of calculating child support. The Trial Court ordered Husband to pay \$461.00 per month in child support in accordance with the Child Support Guidelines. With respect to this issue, the Child Support Guidelines provide, in pertinent part:

2. Imputed Income.

(i) Imputing additional gross income to a parent is appropriate in the following situations:

(I) If a parent has been determined by a tribunal to be willfully and/or voluntarily underemployed or unemployed; or

(II) When there is no reliable evidence of income; or

(III) When the parent owns substantial non-income producing assets, the court may impute income based upon a reasonable rate of return upon the assets.

(ii) Determination of Willful and/or Voluntary **Underemployment** or Unemployment.

The Guidelines do not presume that any parent is willfully and/or voluntarily under or unemployed. The purpose of the determination is to ascertain the reasons for the parent's occupational choices, and to assess the reasonableness of these choices in light of the parent's obligation to support his or her child(ren) and to determine whether such choices benefit the children.

(I) A determination of willful and/or voluntary under or unemployment is not limited to occupational choices motivated only by an intent to avoid or reduce the payment of child support. The determination may be based on any intentional choice or act that affects a parent's income.

(II) Once a parent has been found to be willfully and/or voluntarily under or unemployed, additional income can be allocated to that parent to increase the parent's gross income to an amount which reflects the parent's income potential or earning capacity, and the increased amount shall be used for child support calculation purposes. The additional income allocated to the parent shall be determined using the following criteria:

- I. The parent's past and present employment; and
- II. The parent's education and training.

* * *

(iii) Factors to be Considered When Determining Willful and Voluntary Unemployment or **Underemployment**.

The following factors may be considered by a tribunal when making a determination of willful and voluntary **underemployment** or unemployment:

- (I) The parent's past and present employment;
- (II) The parent's education, training, and ability to work;

* * *

(IV) A parent's extravagant lifestyle, including ownership of valuable assets and resources (such as an expensive home or automobile), that appears inappropriate or unreasonable for the income claimed by the parent;

* * *

(VII) Any additional factors deemed relevant to the particular circumstances of the case.

Tenn. Comp. R. & Regs. 1240-2-4-.04 (2007) (emphasis in original).

With regard to this issue the Trial Court specifically found:

The record establishes that despite the work related injury, [Husband] has earned monies in the maintenance, supervision, and management of rental units. He drives to and from New York periodically for doctor's appointments. He is allowed to make up to \$10,000.00 a year without any impact on his disability related income.

In 2006, he was working with Acoustical Ceiling Tiles and earning \$15.00 an hour. By his own testimony, he can work three to four hours a day light duty. He is receiving no medical treatment in this vicinity for his injury. He concedes when the rental units are full, he can experience a positive cash flow. Even though the rental units have been liquidated, or will have been by the conclusion of this litigation, he still holds the skill set necessary to earn income in management of rental units. While working in New York, he was a superintendent in a rental building. The testimony from a relatively recent employer established he had been working eight hours a day, forty hours a week, at \$15.00 an hour in 2006. There is no persuasive testimony in the record that his condition has deteriorated to the point he no longer can make at least \$10,000.00 per year in addition to his disability payments.

The evidence does not preponderate against these findings relative to Husband's income and his ability to earn income. Given all this, we find no error in the Trial Court's imputing income to Husband for purposes of calculating child support.

Next we address whether the Trial Court erred in ordering that the \$30,000 marital debt owed to Ms. Pezella be assumed solely by Husband. Although Husband argues that the Trial Court ordered that this debt be assumed solely by Husband, the record does not support this assertion. Rather, with regard to this issue, the Trial Court specifically found and held:

[Husband] argues the debt should be borne equally by the parties because it was used solely for household purposes. The Court has ordered the debt to be paid from proceeds from the sale of marital property. Therefore, the debt is being paid with marital assets and is an equal division unless there is a deficit. In the eventuality that the debt to Ms. Pezella is not extinguished by the proceeds of the sale, the Court has ORDERED the balance to be paid by the [Husband]. The Court finds this to be an equitable division as [Husband] took the insurance proceeds for damage to one of the rental units in the amount of \$8,000.00 for his personal use. The evidence has established part of this money was used for a four-week trip to Europe by [Husband]. Further, he has been responsible for the dissipation of marital assets other than the insurance money. He has used rent money for purposes other than mortgage payments and the property has gone into foreclosure. Accordingly, if there is a balance due on the debts to be borne, it is equitable that he bear it.

In his brief on appeal, Husband argues that the statement of the evidence is devoid of any testimony or evidence regarding the debt owed to Ms. Pezella. Husband also argues that there is no evidence in the record as to the value or equity of either duplex and states there is "no reason to presume from the record that either duplex would realize a profit upon a sale." We note that Husband, as the appellant, had the duty "to prepare a record which conveys a fair, accurate and complete account of what transpired in the trial court with respect to the issues which form the basis of the appeal." *Nickas v. Capadalis*, 954 S.W.2d 735, 742 (Tenn. Ct. App. 1997) (quoting *State v. Boling*, 840 S.W.2d 944, 951 (Tenn. Crim. App. 1992)). Husband filed a statement of the evidence which was amended by the Trial Court. As Husband was responsible for preparing the statement of the evidence, Husband has no ground to complain if necessary evidence was excluded from the

statement of the evidence. Clearly, the Trial Court had before it evidence regarding to the debt owed to Ms. Pezella as it made specific findings and holdings with regard to that debt. As we have stated many times, "[t]his court cannot review the facts de novo without an appellate record containing the facts, and therefore, we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings." *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992).

Husband's brief on appeal also argues that the Trial Court "seems to concede that the debt was used solely for household purposes." Husband is mistaken. The Trial Court clearly stated that *Husband argues* that the debt should be borne equally because it was used solely for household purposes. The Trial Court did not find that the debt was used solely for household purposes.

The Trial Court ordered that the debt be paid using proceeds from the sale of marital property and that this constituted an equal division unless the proceeds failed to satisfy the debt. The Trial Court ordered that if the proceeds did not satisfy the debt to Ms. Pezella, then it was equitable for Husband to assume the balance of the debt given that the Trial Court found that Husband had taken \$8,000.00 of marital funds for his own personal use, had dissipated other marital funds, and had used rent money for purposes other than mortgage payments causing marital property to go into foreclosure. The evidence in the record does not preponderate against the Trial Court's findings. We find no error in the Trial Court's order with regard to this debt.

We next consider whether the Trial Court erred in awarding Wife \$5,000 in attorney's fees. In his brief on appeal Husband argues that Wife, who had filed an affidavit of indigency, was receiving free legal aid and that "the evidence preponderates against an order requiring the husband to pay a debt that is not owed by the wife...." Husband also argues that the attorney's fees awarded were "exorbitant." Wife, who was represented by an attorney employed by Southeast Tennessee Legal Services, asserts on appeal that Husband is mistaken "in his opinion as to the nature of both [Southeast Tennessee Legal Services] and its services provided."

Unfortunately for Husband, there is nothing in the record on appeal that shows whether Wife did or did not pay her attorneys. Nor is there anything in the record showing whether Wife is or is not responsible for legal fees incurred. The only evidence in the record on appeal with regard to Wife's attorney's fees is an affidavit filed by Wife's attorney showing that \$15,697.50 worth of legal services had been rendered on behalf of Wife. The Trial Court noted that it awarded "only a third of the attorney's fee requested," and stated that "the Court's findings concerning income, assets and dissipation of assets, determination of child support, and fault support the award of the attorney's fee." The evidence contained in the record before us does not preponderate against any of these findings of the Trial Court. We find no error in the award of attorney's fees.

Wife has requested an award of attorney's fees on appeal. As pertinent to this issue, Tenn. Code Ann. § provides:

The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for

alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

Tenn. Code Ann. § 36-5-103(c) (2005). Wife was granted primary residential custody of the parties' minor child, and she is the prevailing party with regard to this issue on appeal. As such, Wife is entitled to attorney's fees under Tenn. Code Ann. § 36-5-103(c). We remand this case to the Trial Court for a determination of the proper amount of attorney's fees to be awarded to Wife on appeal.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for a determination of the proper amount of attorney's fees to be awarded to Wife on appeal and for collection of the costs below. The costs on appeal are assessed against the Appellant, Zoran Djordjevic, and his surety.

D. MICHAEL SWINEY, JUDGE